UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

BRIAN BEVAN,

Plaintiff,

vs. Case No. 2:03-cv-500-FtM-29SPC

MIKE SCOTT, individually and in his official capacity as Sheriff of Lee County, Florida, JOHN MCDOUGALL, individually, KENNETH ERNE, MARK DURLING, HARVEY HUDNALL, FRED BOND, DAVE BONSALL, ROSS DI PASQUALE, SERGEANT HAMILTON, RICHARD TRAVIS COWART, CLAUDIA GADD COWART, JACKIE COWART, SOUTHWEST UTILITY SYSTEMS, INC., CHUCK FUNDERMARK and CHUCK'S WHISKEY CREEK SERVICE, INC.,

Defendant.

ORDER

This matter comes before the Court on plaintiff's Motion for

New Trial (Doc. #330), Motion for a New Trial and Interview of

Juror (Doc. #331), both filed on February 27, 2006, and Motion to

Accept Filing Out of Time (Doc. #338) filed on March 7, 2006.

Additionally, plaintiff filed a Notice of Filing Personal

Information Regarding Jury Foreperson in Accordance with Rule

5.01(d) and in Furtherance of Support of Plaintiff's Prior Motion

to Accept Filing Out of Time (Doc. #339) on March 17, 2006, and

Plaintiff's Additional Request to Interview Juror Foreperson and

the Grant the Plaintiff a New Trial (Doc. #340), filed on

March 20, 2006.

Initially, plaintiff seeks to have the Court accept

his

Memorandum of Law in Support of Plaintiff's Motion for

New Trial

(Doc. #333) as timely filed because it was filed on

February 28,

2006. The motion will be granted to the extent that the Memorandum will be considered in conjunction with the Motion for New Trial (Doc. #330)

Plaintiff seeks a new trial regarding the presentation and admission to the jury of evidence regarding the seizure of the trailer and case law. Having considered the motion, the Court finds no merit. The motion will be denied.

Plaintiff seeks a new trial on the basis that his case was decided by a jury consisting of more than six persons and that one of the alternates was made the Foreperson. The Court assumes, although plaintiff does not provide a basis, that the motion is brought pursuant to Fed. R. Civ. P. 59. Plaintiff cites Florida state cases for the premise that reversible error has occurred.

Although the Florida Rule of Civil Procedure 1.431(g) (1) provides that alternates do not participate in the verdict, the state rules of procedure do not apply in federal court. Under the Federal Rules of Civil Procedure,

> The court shall seat a jury of not fewer than six and not more than twelve members and all jurors

> shall participate in the verdict unless excused from service by the court pursuant to Rule 47 (c) . Unless the parties otherwise stipulate, (1) the verdict shall be unanimous and (2) no verdict shall be taken from a jury reduced in size to fewer than six members.

Fed. R. Civ. P. 48. A 1991 Amendment abolished the institution of the alternate juror so that all the jurors, not *fewer than six,* could participate in the evaluation of the evidence. Fed. R. Civ.

P. 47 advisory committee's note. See also Smith v. Gulf Oil Co., 995 F.2d 638, 644—646 (6th Cir. 1993); Montiel v. City of L.A., 2 F.3d 335, 337 (9th Cir. 1993) . The Court finds no Seventh Amendment issue or violation. Therefore, the motion for a new trial on the basis of the participation of the alternate jurors will be denied.

Additionally, the Court finds that plaintiff has not proffered sufficient evidence of juror misconduct to warrant his request to interview a juror or for the Court to take any action concerning the matter. Therefore, the request to interview the juror will also be denied.

Accordingly, it is now

ORDERED:

1. Plaintiff's Motion for New Trial (Doc. #330) is **DENIED.**

2. Plaintiff's Motion for a New Trial and Motion for Interview of Juror (Doc. #331) are **DENIED.**

3. Plaintiff's Motion to Accept Filing Out of Time (Doc. #338) is GRANTED to the extent that the Memorandum of Law in Support was considered with the Motion for New Trial (Doc. #330)

4. Plaintiff's Additional Request to Interview Juror Foreperson and Motion to Grant the Plaintiff a New Trial (Doc. #340) are **DENIED.**

DONE AND ORDERED at Fort Myers, Florida, this 30th day of

March, 2006.
JOHN E STEELE
United States District Judge

Copies:
Parties of record